86-1076

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BENJAMIN PRIETO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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60 pp

EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

1. Was the evidence adduced against Petitioner sufficient to sustain a conviction beyond a reasonable doubt?

2. Was Petitioner deprived of a fair trial and Due Process of law and his Sixth Amendment Right to Compulsory Process by the Trial Court's decision not to permit defense witnesses to testify out of turn?

3. Was the Petitioner deprived of a fair trial and Due Process of law by the Prosecution's suppression of exculpatory evidence?

4. Was Petitioner deprived of a fair trial and Due Process of law when the Trial Court, over defense objection, allowed the court appointed interpretor to testify as a Government witness?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Benjamin Prieto, (hereinafter "the Petitioner") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction entered against the Petitioner by the United States District Court for the District of New Jersey (Bissell, J.).

OPINION BELOW

The unpublished opinion and order of the Court of Appeals affirming the judgment of conviction appears in Appendix A, UNITED STATES V. BENJAMIN PRIETO, Docket No. 85-5039.

JURISDICTION

On November 22, 1985, the Court of Appeals entered its order affirming the judgment of conviction. This Court's jurisdiction is invoked under Title 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall. . .be deprived of of life, liberty, or property, without Due Process of Law;. . . ."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to have
>
> Compulsory Process for obtaining witesses in his favor and to have the assistance of counsel for his defense."

Federal Rules Of Criminal Procedure, Rule52(b):

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF THE CASE

Petitioner stands convicted of two Federal drug offenses, 21 United States Code §846, conspiracy to possess and distribute cocaine (Count I), and 21 United States Code §843(b), use of a communication facility in furtherance of a felony, (Counts 8, 9 and 10).

Petitioner was sentenced to a term of 15 years on the conspiracy and four years on each of the other Counts, all to be served concurrently and is presently serving his sentence.

A. The Government's Proof at Trial

The twenty-seven count indictment charged Petitioner and numerous others with a conspiracy to distribute and possess with intent to distribute quantities of cocaine. The head of the conspiracy, Severo Sanclemente, was the chief Government witness. Petitioner was also charged with three counts of using the telephone in furtherance of the conspiracy.

The proof of the existence of a conspiracy to possess and distribute cocaine was abundant. Numerous accomplice witnesses testified as to their involvement with the use, possession and distribution of the drug, and testified to the direct participation in such activities by others.

Severo Sanclemente testified on behalf of the Government as to his background and history

in the cocaine business. He testified that he had owned a tavern in 1978 and a travel agency in 1981, and was in the cocaine business from 1979 to 1984. He gave a detailed account of his activities in the cocaine trade, and related his discussion with his brother-in-law, Juan Gil, directed at obtaining a new source of cocaine in Colombia.

The foregoing represents only a small fraction of the evidence presented to show the existence of a lengthy conspiracy involving many individuals, replete with drug transactions, taped telephone calls, and many interpretations and conclusions of witnesses. In contrast, the evidence relevant to Petitioner was only a small part of the entire trial because his participation in the conspiracy was alleged to have occurred at the very end when Sanclemente was seeking a new supplier.

On May 2, 1984, Sanclemente received a telephone call from Colombia from his brother-in-law, Juan Gil, who subsequently put on the telephone a man, presumably Petitioner, whom Gil identified as the "Uncle." This telephone conversation

was taped, and the tape and its transcript were introduced as Government Exhibits 148 and 148A respectively. In this conversation, the basis for the first "telephone" count in the indictment, Petitioner and Sanclemente discuss a sale and delivery of taximeters to Sanclemente in New York. They discussed various arrangements to meet in New York, or Miami, and Petitioner, in describing the taximeters, refers to them as "automatic," transistorized extra, "Pulsar, Ltd." Never in this, or any other, taped conversation involving Petitioner is there any reference to cocaine or any other drugs. All taped conversations were in Spanish, and the tapes were submitted to the jury along with transcripts of the English translations. Severo Sanclemente never met or spoke with Petitioner prior to this conversation. He nevertheless testified that the word "taximeter" was a code word for cocaine, and interpreted much of the conversation in terms of an agreement to purchase cocaine from Petitioner.

The subject of Count 9, the next "tele-

phone" count of the indictment was a call from Sanclemente to Petitioner on May 4, 1984. In this call, they discussed the time of Petitioner's arrival in Miami, and the quantity of taximeters available to Petitioner.

Sanclemente referred to the necessity of buying tools to install the taximeters, and that he had 5 to 7 cars which were awaiting the installation of "taximeters." The number of taximeters mentioned by Petitioner as having been available to him was a hotly disputed trial issue. The original Government translation stated "about 30" while a second translation stated "about 3 to 3½."

During the same conversation Sanclemente and Gil discussed among other things, Sanclemente's credit background, and the renewal of Gil's visa. Again, although there was no mention of cocaine, Sanclemente interpreted this conversation to the jury wholly in terms of a proposed drug transaction.

Count 10 of the indictment was based on a May 10, 1984 telephone call to Sanclemente where

Petitioner, identifying himself as Sanclemente's "Uncle," asks Sanclemente to call a man named Don Javier and give him a message. They then discuss Petitioner's arrival, presumably in Miami, and the fact that Petitioner's brother-in-law resigned from his company and that ". . .this country has turned inside out." They conclude by making arrangements for Petitioner call Sanclemente at 9:00 a.m. the next morning.

It is fair to state that these conversations, on their face, are no evidence of conspiracy to engage in drug trafficking, and that the Government relied heavily, if not, completely, upon the testimony of Severo Sanclemente in interpreting them as drug-related. There were other telephone conversations involving Petitioner which are even more innocuous than the ones referred to above.

Sanclemente met Petitioner for

the only time outside the Wentworth Hotel in New York City where Petitioner was staying. Petitioner was at a public phone, and Sanclemente was brought to him by Petitioner's son, Armando Prieto. They proceeded to a local Burger King restaurant where, according to Sanclement's testimony they discussed the price for a kilo of cocaine. Sanclemente stated that while the word "cocaine" was not used, the word "kilo" was. These conversations were not recorded. Sanclemente did not testify as to the use of any code words as he had in connection with the recorded conversations. Instead, he concluded, "We had an agreement to receive cocaine personally from Prieto," despite the fact that the word "cocaine" had never been mentioned once in all his conversations with Petitioner. Additionally there was no evidence adduced by this witness as to how this agreement came about.

Rudolph Robinson, an electrical engineer, testified that he is one-half owner of Pulsar Technology Systems, a company which manufactures electronic taximeters and that he had shipped taximeters to Carlos Zapata in Colombia, through a customs broker named Caraval.

Petitioner had visited Pulsar in New York, and paid Robinson in cash for a quantity of taximeters on behalf of Carlos Zapata. Zapata's distribution rights with Pulsar only permitted the importation and distribution of taximeters to and within Colombia, and Petitioner told Robinson that Zapata had offered him the sole distribution rights under his agreement with Pulsar.

A notarized letter agreement was introduced into evidence and read to the jury. This agreement was between Petitioner and Carlos Zapata and detailed that Petitioner would participate in the profit from

the importation of taximeters from Pulsar Corp., and would pay to Pulsar, in New York City, the sum of $25,000.

A stipulation was read into the record to the effect that customs broker Juan Caraval, if he were called to testify, would testify that he cleared through customs the taximeters referred to in receipts found on Petitioner's person at the time of his arrest.

REASONS FOR GRANTING THE WRIT

A. The evidence adduced against Petitioner was insufficient to sustain a conviction beyond a reasonable doubt as to the elements of knowledge and intent.

The central issue is whether there was sufficient evidence to allow the jury to conclude that Petitioner was guilty beyond a reasonable doubt of each of the offenses as charged. Viewing the evidence as we must, in the light most favorable to the Government, Glasser V. United States, 315 U.S. 60, 80 (1942); United States V.

Koss, 506 F. 2d 1103, 1106 (2d Cir. 1974); United States V. Sisca, 503 F. 2d 1337, 1342 (2d Cir. 1974); United States V. McCarthy, 473 F. 2d 300, 302 (2d Cir. 1972); and taking into account the evidence presented by Petitioner as well as that presented by the Government, Unites States V. Tramunti, 500 F. 2d 1334, (2d Cir. 1974); United States V. Pui Kan Yam, 483 F. 2d 1202, 1208 n. 7 (2d Cir. 1973), cert. den. 415 U.S. 984 (1974); United States V. Arcuri, 405 F. 2d 691, 695 n. 7 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969), Petitioner contends there was not.

On the basis of all the evidence presented, the jury could have reasonably found the following facts:

That Severo Sanclemente was in the cocaine business from 1979 to 1984 and that Severo Sanclemente was the main perpetrator of organizing the conspiracy as charged. Additionally, the evidence showed

that Petitioner had a telephone conversation with Sanclemente and the word "taximeter" was frequently used during the course of this conversation. The evidence further demonstrated that it was Sanclemente who contacted Petitioner for the first time by telephone and that Petitioner had not heard of or ever met Sanclemente prior to that phone call. Further evidence showed that Petitioner and his son did travel to the United States, from Colombia, and met with Sanclemente. Included in the evidence was that the word "kilo" was mentioned only by Sanclemente, with no acknowledgement from Petitioner pursuant to the reference of the word "kilo". Finally, no evidence was adduced by the Government throughout the whole trial that Petitioner ever used the word cocaine or kilo or that anyone ever received any cocaine from Petitioner. As a consequence the Government did not sustain the burden of proving that this

Petitioner used a communication facility to facilitate a knowing and willful conspiracy.

The Government argued that there was overwhelming evidence that a wide-ranging conspiracy to distribute cocaine existed. Petitioner does not dispute that fact. However, he vehemently denies his participation in that conspiracy and contends that he was only found guilty pursuant to impermissible inferences. "Inference" of guilt is not supposition or conjecture, but is logical deduction from facts proved, and guesswork is not a substitute therefore. Mitchell V. Machinery Center, Inc., 297 F. 2d 883 (CANM.1961). The only basis for finding that Petitioner referred to cocaine as "taximeter" derives from Sanclemente himself, with no explanation as to how he arrived at this conclusion. The record is barren of any evidence demonstrating that Petitioner had prearranged any code words

referring to cocaine, purity, etc., with Sanclemente or anyone else. Therefore, the Government failed to sustain the burden of proving beyond a reasonable doubt that Petitioner used certain words with the knowledge and intent to commit any crime.

Although Petitioner recognizes that code words that are commonly recognized as referring to cocaine do exist, he contends that none were used in the conversation in question. Thus, it could not have been reasonably inferred that the conversation in fact pertained to drugs. Therefore, in order for Petitioner to have been afforded fundamental rights under the Due Process of Law, it would be necessary for the Government to show that Petitioner himself had knowledge of and intended for the word "taximeter" to be used in reference to cocaine.

Undoubtedly, the Government has the burden of proving every element of the

crime charged. Knowledge and intent are two essential elements of the crime charged in the instant case.

Further, evidence in the record indicates that Petitioner was actually associated with a company that sold taximeters. Petitioner contends that an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof. Thus, the bare conversation regarding "taximeters" with nothing more, was not sufficient to sustain a conviction.

Petitioner contends that despite adequate proof of the existence of a conspiracy and Sanclemente's involvement therein that the Government failed to produce sufficient evidence proving Petitioner guilty beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970).

The requirement that guilt of a

criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times and is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. C. McComrick, Evidence, §321, pp. 681-682 (1954). See also 9 J. Wigmore, Evidence, §2497 (3 Ed. 1940). Although virtually unanimous adherence to the reasonable doubtstandard in common law jurisdictions may not conclusively establish it as a requirement of Due Process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan V. Louisiana, 391 U.S. 145, 155 (1968).

Many opinions of this Court indicate that it has long been assumed that

proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, e.g., Miles V. United States, 103 U.S. 304, 312 (1881); Davis V. United States, 160 U.S. 469, 488 (1895); Holt V. United States, 218 U.S. 245, 253 (1910); Wilson V. United States, 232 U.S. 563, 569-570 (1914); Brinegar V. United States, 338 U.S. 160, 174 (1949); Leland V.Oregon, 343 U.S. 790, 795 (1952); Holland V. United States, 348 U.S. 121, 138 (1954); Speiser V. Randall, 357 U.S. 513, 525-526 (1958). Cf. Coffin V. United States, 156 U.S. 432 (1895). Mr. Justice Frankfurter stated that:

> "[i]t is the duty of the Government to establish. . .guilt beyond a reasonable doubt. This notion- basic in our law and rightly one of the boasts of a free society - is a requirement and a safeguard of due process of law in the historic, procedural content of 'Due Process.'" Leland V. Oregon, supra, at 802-803.

In a similar vein, this Court said that:

> "(g)uilt in a criminal case must be proved beyond a reasonable doubt, and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeiture of life, liberty and property." Brinegar V. United States, 338 U.S. at 174.

In Davis V. United States, supra, a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said:

> "On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. . .No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them. . .is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." 160 U.S. at 484.

The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Coffin V. United States, 156 U.S. at 453.

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for congent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not

condemn a man for commission of a crime when there is reasonable doubt about his guilt, as in the instant case.

In Speiser V. Randall, 357 U.S. at 525-526, this Court observed:

> "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error reduced as to him by the process of placing on the other party the burden of. . . persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due Process commands that no man shall lose his liberty unless the Government has borne the burden of . . .convincing the factfinder of his guilt."

To this end, the reasonable doubt standard is indispensable, for it "impressed on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, I Family Law Quarterly, No. 4 pp. I, 26 (1967).

In In Re Winship, 397 U.S. 358, 364 (1970) this Court explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Petitioner contends that the Government failed to sustain its burden as to the essential elements of knowledge and intent and submits that certiorari should be granted so that this Court may review this significant constitutional question.

REASON FOR GRANTING THE WRIT

B. The Trial Court's decision not to permit defense witnesses to testify out of turn deprived Petitioner of a fair trial, Due Process of law and his rights under the Sixth Amendment's Compulsory Process.

As stated above, Petitioner's involvement in the taximeter business, and whether he referred in the critical telephone conversation with Sanclemente to "3½" taximeters, or "30" taximeters, were

paramount issues in this case.

During the course of the trial, Petitioner's attorney, Mr. Taylor, advised the Court of the presence in the Courthouse of two witnesses from Bogota, Colombis, to testify as to Petitioner's activities and involvement in the taximeter business. At a later time, and near the end of the Government's case, Mr. Taylor advised the Court that these witnesses were most "desperate" to return to Colombia, that they both had pressing personal commitments, and that Mr. Taylor had spoken to an Assistant Ambassador regarding certain problems with their visas. Mr. Taylor stated that their testimony would take five minutes each, and that he wished to have them testify out of turn.

According to an offer of proof made by Mr. Taylor, one of the witnesses was a customs broker who would testify that he received a shipment of 100 taxi-

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meters into Colombia on behalf of Petitioner. The other, Mr. Martinez, was a representative of Pulsar who was involved with the importation of taximeters. He was to testify that he received the taximeters from the customs broker and that he transported 30 taximeters to Petitioner, and disbursed 60 to other locations in Colombia.

This relevant, material and vital testimony would clearly have supported the defense assertion that the proper translation of the disputed statement was that Petitioner had "30" taximeters left, and not "3½" as maintained by the second Government translation. For want of this testimony, and conjoined with the translator's assertion that the number in question was "3½" the jury was forced to conclude that "3½" taximeters referred to cocaine.

Mr. Taylor again asked that these witnesses testify out of turn, reminding

the Court that they'd been available for several weeks and had to return home. The Court was willing to have them testify but the Government objected. Despite the fact that Mr. Taylor had earlier advised the Court that the witnesses had indicated that they weren's staying any longer, the Court nevertheless sustained the Government's objection, as it was unwilling to interfere with the order of the Government's case.

Mr. Taylor then requested that the Court admonish the witnesses in a "last ditch" effort to insure the availability of their testimony. The Court obliged and instructed the witnesses on November 9th to remain available to testify for the week of November 13th. Subsequently, Mr. Taylor was forced to advise the Court that the witnesses had disregarded the Court's admonition and returned to Colombia.

It was obvious to all participants

that the evidence to be given by these witnesses was of tremendous importance to Petitioner. It further should have been obvious to the Court, in light of Mr. Taylor's advice, that there was imminent danger that the witnesses would leave the country.

Even the shortest and most necessary delay may result in actual prejudice to the defense of a criminal case. In Petitioner's case, the delay was a successful and intentional device by the Government to gain tactical advantage over the accused and caused substantial prejudice to Petitioner's righ to a fair trial. Cf. United States V. Marion, 404 U.S. 307, 324 (1971). Petitioner contends that under the totality of the circumstances, that the trial court erred in not permitting the testimony of these witnesses out of turn, and that this decision stripped Petitioner of his Fifth and Sixth Amendment

rights. Cf. United States V. Valenzuela-Bernal, 458 U.S. 858, 867-869 (1982).

The right of an accused to have Compulsory Process for obtaining witnesses in his favor, guaranteed in Federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment, so as to be applicable in state trials. Washington V. Texas, 388 U.S. 14 (1967).

This right has been described as the most basic ingredient of Due Process of Law by this Court as follows:

> "A person's right to reasonable notice of charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." Washington V. Texas, Id. at 19, citing In Re Oliver, 333 U.S. at 273.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fuadamental element of Due Process of Law. Washington V. Texas, supra. Therefore, when an accused is denied this opportunity and prejudiced by the delay, as in the instant case, a denial of Due Process has occurred in its clearest form. For this reason, the affirmance of the judgment of conviction by the Third Circuit must be reversed to correct a fundamental miscarriage of justice. Petitioner submits

that this Court should grant certiorari to review this significant constitutional question.

REASON FOR GRANTING THE WRIT

C. The Government's suppression of exculpatory evidence deprived Petitioner of a fair trial and Due Process of Law.

Petitioner has already referred in the statement of the case to the testimony of Rudolph Robinson, of Pulsar Co., a New York manufactuer of taximeters. Mr. Robinson had testified before the Grand Jury, but the defense was unaware of his testimony until, on the Government's Rebuttal Case, the prosecutor proffered Robinson's Grand Jury minutes. Robinson's Grand Jury testimony verified that Petitioner had indeed engaged in certain taximeter transactions with Pulsar, and had stated to Robinson that he'd considered purchasing the importation rights for Pulsar taximeters from Carlos Zapata.

The prosecutor's fanciful response was that this was no Brady material in that it showed that Petitioner himself was not actually in the taximeter business.

The Court agreed that the Grand Jury testimony was "not truly exculparory," reasoning that:

> "The essence of the defense of Benjamin Prieto '. . .is that (he) was in the taximeter business, but, more particularly. . .that he was in a business which would have resulted or could have resulted in his exporting of taximeters from Colombia to the United States.'"

The Court continued that since Petitioner's conversation with Sanclemente involved the shipment of taximeters to the United States, and since his conversation with Robinson, as evidenced by the Grand Jury testimony, dealt with shipment of taximeters to Colombia:

> "The testimony of Rudolph Robinson would not in the Court's view in any way support the existence of a legitimate business venture by Mr. Prieto for

taximeters from Colombia to the United States"

The Court further observed that the evidence emphasized that Zapata's resale rights under the agreement with Pulsar were limited to Colombia, not here in the United States and said: "As such, the contents of this transcript are every bit as much incriminatory as arguably exculpatory." Petitioner argues that the characterization by both the Court and the prosecutor of this testimony as "incriminatory" and not "exculpatory" was erroneous and not congruent with the trial evidence.

Petitioner was charged with a drug conspiracy, a very serious crime. The fact that he might discuss with Sanclemente a business deal which would contravene a distribution agreement with Pulsar is certainly "exculpatory" as contrasted with a potential agreement to distribute drugs. The testimony of Rudolph

Robinson was solid evidence of Petitioner's activities in the distribution of Pulsar taximeters and of crucial importance in view of Sanclemente's interpretation that taximeter meant "cocaine," the brand name "Pulsar" referring to the quality of the drug.

It could easily be concluded, for example, that Petitioner had every intention of shipping the meters back to the United States in violation of the agreement with Pulsar, and so account for his failure to identify himself over the telephone. In any event, this evidence gives flesh to the view that Petitioner was actually involved with the distribution of taximeters, that the brand name "Pulsar" was a legitimate appellation, and supports the view that his conversations were much more susceptible to a legitimate interpretation than to one involving cocaine. After all, the only direct evidence showing

an involvement with cocaine was with regard to Sanclemente's activities, and not those of Petitioner.

The view that this evidence was not exculpatory because it involves distribution rights exclusively in Colombia, or as advanced by the prosecutor, that it only shows Petitioner to have acted on behalf of Zapata, is erroneous. The fact is that this testimony, had it been given to the defense in a timely fashion, could well have materially altered the defense perception of the case and the approach taken throughout the entire proceedings.

The Court gave the defense the opportunity, when this evidence first came to light, to reopen its direct case and adduce Robinson's testimony as a part thereof. This necessitated what amounted to the "lightning-like" decision on Mr. Taylor's part to permit the Government to call this witness. The mere offer by the

Court to allow this choice must, we submit, be viewed as at least some recognition of the testimony's exculpatory value. Beyond this, however, having to make such a rapid decision about so important a matter, when the information should have been made available in a timely and meaningful manner hardly permitted the defense to deliberate and develop its theory, tactics and strategy, necessary to properly represent Petitioner.

Further, the Court's observation that the evidence was "every bit as much incriminatory as arguably exculpatory" gives rise to an inference that if the evidence is as much incriminatory as exculpatory, then it must be in at least equal part exculpatory. Since this conclusion is logically compelled, defense counsel should have been permitted the opportunity to determine how and when or if at all, he intended to utilize the ex-

culpatory portion of the evidence. Clearly, the denial of this information to counsel materially impaired his effectiveness, and constituted an abridgement of the right to counsel. Thus, the trial court actually made the determination for defense counsel as to what use he could have made of this Brady material and deprived him of the time to develope it.

As a result, the right of Petitioner's counsel to fashion the defense in his own way, to make appropriate and full use of exculpatory material, to conduct its investigation, to make appropriate opening statements to the jury, to plan its presentations of the vital matter as to whether Petitioner was actually in the taximeter business was critically prejudiced by giving the defense the exculpatory material at the final hour of the trial, thus crippling the adversary process. United States V. Bagley, 105 S. Ct. 3375,

3384 (1985).

This Court held, in Brady V. Maryland, 373 U.S. 83 (1967), that the suppression by the prosecution of evidence favorable to an accused upon request violates
Due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle behind this rule is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused because society wins not only when the guilty are convicted but when criminal trials are fair. The administration of justice suffers as well when any accused is treated unfairly. Mooney V. Holohan, 294 U.S. 103, 112 (1935).

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate

him or reduce the penalty helps shape a trial that bears heavily against the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. In Petitioner's case, the withheld evidence was material because a reasonable probability exists that had the evidence been disclosed to the defense the result of the proceeding would have been different. United States V. Bagley, 105 S. Ct. at 3384.

This Due Process violation alone, we contend denied Petitioner a fair trial and mandates reversal. We submit that conjoined with the issues already raised herein, that the Due Process violation is of such magnitude that this Court should grant certiorari to review this significant constitutional question.

REASON FOR GRANTING THE WRIT

D. The testimony of the Court-appointed interpretor as a Government witness denied

Petitioner a fair trial.

A critical issue presented in the trial was whether Petitioner, during a telephone conversation with Sanclemente had, in referring to a quantity of taximeters, said "3½," or "30 to 40" taximeters. This was important because the Government argued in summation that the term "3½" obviously referred to "cocaine" since there could not be "3½ taximeters." Additionally, the testimony of Rudolph Robinson of Pulsar Co., adduced evidence that taximeters do not come in halves. Further,Sanclemente, to support his assertion that the conversation was about cocaine and not taximeters testified:

> "Because in a conversation that Mr. Prieto and I have, he tells me that he only has left three, three and a half and four, and a taximeter cannot be divided in half."

The first Government translation of this conversation read ". . .we only

left about 30." This translation was performed by Special Agent Cruz Cordero under the supervision of Special Agent Smilek. The second translation was made for the Government by Ms. Beatriz Hood, the official court interpreter who served as trial interpreter, and the Government called her as a witness to substantiate the accuracy of her translation. Ms. Hood had translated the disputed phrase in the Government revised translation as follows:

> ". . .then we have only left about 3 to 3½."

Thus, it is clear that the issue as to what the disputed phrase actually was, was taken very seriously by the parties, and that this was indeed an important question given Sanclemente's interpretation of "taximeter" as referring to cocaine, as well as his other interpretations of so-called code words. There can be no doubt that evidence concerning the translation

and whether Petitioner said "3½" or "30" may well have been determinative in the jury's verdict.

In recognition of the importance of establishing that Petitioner used the word "3½," the Government called Beatriz Hood to testify as to the accuracy of her translations, as opposed to the first Government translations by Agent Cruz. Over defense counsel's strenuous objection the Court permitted her testimony, saying:

> "That objection is also overruled because the essence of the evidentiary question here is not in the testimony of the prior witnesses, but in the record that appears on the transcript in the alternate versions thereof."

Despite this assertion, a major result of Ms. Hood's testimony was in effect to support and certify the testimony of chief witness Sanclemente, and the interpreter should not have been permitted to testify because the prejudicial impact far outweighed the probative value of the

evidence. However, even assuming the sole effect of her testimony was to substantiate the accuracy of one or another transcript, it is still submitted that permitting her testimony was so prejudicial as to deny Petitioner his right to a fair trial.

Beatriz Hood was the official court appointed interpreter in this trial. There can be no doubt that in the jury's mind, Ms. Hood's testimony had the imprimateur of the Court since the Court appointed her, thus, implicitly vouching for her testimony, her interpretive skills and her integrity. Nevertheless, Beatriz Hood, official court interpretor, was permitted to testify on behalf of the Government and against the defendant as to the critical issue in this case. What makes the admission of this evidence even more egregious is the fact that clearly the Government could have called any competent interpreter to testify as to the

accuracy of either translation. It was unnecessary to have an official court appointee testify against Petitioner.

On cross-examination Ms. Hood testified that she had been Sanclemente's translator since his arraignment; that Sanclemente had assisted her to some degree with his identification of voices when she'd listened to the tapes; that she'd developed a "rapport" with Sanclemente; that she had been appointed by the Court; and that she'd worked with the United States Attorney and with Mr. Warren, the Government trial attorney, in the past and hoped to do so again.

Of course a serious question initially is whether the Court, with knowledge that Ms. Hood had made translations of important prosecution evidence for the Government, should have appointed her as translator in the first place. That being done, there was certainly no reason to

then permit her to testify against Petitioner, after she had sat through the trial and made translations for the Court and jury, after both Court and jury had accepted her translations as true and unquestioned renditions in English and accepted her word as the absolute arbiter of what had been said in Spanish. Thus, there is no doubt that she appeared to the jury as being "for" Severo Sanclemente nor doubt that she appeared to the jury as being "against" Petitioner. Unquestionably, the jury could not avoid accepting her testimony as "gospel truth" and beyond criticism, question, or scrutiny. Most important, since there is no doubt that as the official Court appointed interpreter her testimony appeared to the jury as having been vouched for by the Court, the jury may well have seen the Court to endorse the proposition that "3½" was uttered by Petitioner.

Long after Ms. Hood's testimony, the Court obliquely recognized that Ms. Hood's impartiality had been thrown into question. As mentioned in the Statement of the Case, there came a time when the translation of a certain agreement between Petitioner and Carlos Zapata was presented to the jury. In discussing the manner of its presentation, the Court said to Petitioner's attorney:

> "you might have Ms. Hood (the interpreter) read those contents as a translation from the Spanish or you may choose to have her, perhaps with your own (Spanish speaking) asssitant reviewing her translation, prepare a written translation to be appended to the exhibit itself and be submitted to the jury."

This suggestion in the light of Ms. Hood having testified earlier, is most curious. The Court's suggestion was by no means intended as an additional check upon the accuracy of Ms. Hood's work. If such were the case, the Court would have suggested

that both sides have their Spanish speaking assistants review Ms. Hood's translations.

Petitioner respectfully submits that there is a clear danger in proceeding in this fashion and that no Court official, especially one who is known by the jury to have been appointed by the Court, and who has functioned in her official capacity throughout the trial, and upon whom both Court and jury depended for their understanding of the words of the chief Government witness should be permitted to testify against a defendant for any reason, as to any issue, even where the evidence sought is not available from any other source.

Federal Rules of Evidence Rule 403 provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . ."

It is recognized that an evidentiary ruling under Rule 403 is not to be overturned

unless there is a clear showing the district judge abused his discretion. United States V. Clifford, 604 F. 2d 86, 89 (3rd Cir. 1983). Petitioner submits however, that in this case there has indeed been a clear showing of abuse of discretion by the trial court. There can be no doubt that where, on a critical issue the evidence supported the testimony of the Government's chief witness whose credibility was under serious attack and where the evidence given by the translator could have been easily obtained through the expert testimony of any competent Spanish translator, that the admission of such testimony was erroneous and a clear abuse of discretion which critically prejudiced Petitioner's right to a fair trial.

Opinions rendered by a prosecutor, for example, as in a summation, are seriously disfavored for the reason that such opinion may be given undue weight by a jury,

since a prosecutor is a public official. United States V. Haberman, 583 F. 2d 222 (5th Cir. 1978).

Petitioner contends that opinion evidence, unnecessarily given, by a translator was not merely a public official but an actual Court official, whose skill and disinterest had been vouched for by the Court, and upon whom the jury, Court, attorneys, witnesses, and defendants had all heavily depended throughout the trial was far more prejudicial, and that the admission of this testimony violated Petitioner's right to a fair trial

There is one final observation to be made about the prejudicial impact of the testimony of Ms. Hood who translated all English testimony and proceedings for the benefit of the defendants. She also presumably translated discussions between these defendants and their attorneys. This put her squarely in the "camp" of the

defense, and she was, in a sense, an "agent" for the defense attorneys.

Despite this fact, she not only had substantial contact with the Government and its chief witness, she not only translated the version of the Government's most important evidence, but she then testified against Petitioner regarding a crucial issue. It is submitted that in addition to any actual prejudice suffered by Petitioner by this occurrence, the appearance of prejudice is so substantial as to deprive Petitioner of Due Process and a Fair Trial.

Petitioner submits that this error assumes even greater magnitude where a serious question exists as to the sufficiency of the evidence. For these reasons, it is respectfully requested that the Court grant certiorari to review this substantial constitutional question and establish standards which will assure

fundamentals of Due Process in the use of Court appointed interpretors at trial.

Petitioner respectfully asks that this case be decided in accord with Chessman V. Teets, 354 U.S. 156 (1957), and Crampton V. Ohio, 402 U.S. 183 (1971). In Chessman V. Teets, this Court held that:

> "requirement of due process must be respected no matter how henious the crime in question may be and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with procedure demanded by the Constitution."

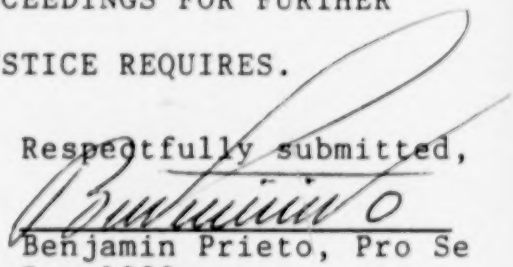
In Crampton V. Ohio, this Court held that the Constitution requires that criminal trials be fairly conducted and the guaranteed rights of defendants be scrupulously respected.

CONCLUSION

WHEREFORE, FOR THE FOREGOING REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND CONSE-

QUENTLY REVERSE THE JUDGMENT OF CONVICTION AND REMAND THESE PROCEEDINGS FOR FURTHER CONSIDERATION, AS JUSTICE REQUIRES.

Respectfully submitted,



Benjamin Prieto, Pro Se
Box 1000
Milan, Mich. 48160

CERTIFICATE OF SERVICE

I, Benjamin Prieto, do say that on this date December 23, 1986, that I have deposited in the United States Mail service, located at Milan, Michigan, three (3) true and correct copies of the entire contents of all of the foregoing booklets, addressed to: The United States Attorney's Office; United States Post Office & Courthouse; Newark, New Jersey 07101; in a duly franked envelope.

Benjamin Prieto

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5039

UNITED STATES OF AMERICA

V.

BENJAMIN PRIETO
a/k/a "UNCLE" and "UNCLE JUANITO"

BENJAMIN PRIETO,
Appellant

Appeal from the United States District Court for the District of New Jersey-Newark
(D.C. Criminal No. 84-00176-02)

District Judge: Honorable John W. Bissell

Submitted: November 22, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, Circuit Judges

JUDGMENT ORDER

This cause came on to be heard on the record from the United States District Court for the Districe of New Jersey

and was submitted under Third Circuit Rule 12(6) on November 22, 1985.

Appellant, Benjamin Prieto, a/k/a "Uncle" and "Uncle Juanito", claims (1) that there was insufficient evidence to convict this appellant of the crimes charged; and (2) that taken singly and together, and in light of the weakness of the Government's case, (a) the improper testimony of the official interpreter, (b) the failure of the district court to permit defendant's witnesses to testify out of turn, (c) the failure of the Government to turn over "Brady" material, (d) the improper admission of appellant's statements, and (e) the reinforcement by the Government of defendant's "appearance" of guilt by unfairly utilizing the strategy of "guilt by association," operated to deny appellant a fair trial.

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
Sally Mrvos, Clerk

DATED: NOV. 25, 1985